STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES, a Michigan nonprofit membership corporation,

Plaintiff-Appellee,

v

STATE OF MICHIGAN AND OFFICE OF THE STATE EMPLOYER,

Defendants-Appellants.

Supreme Court No. **147511**

Court of Appeals No. **304920**

Court of Claims Case No.: **10-37-MK**

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PLAINTIFF APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF QUESTIONS INVOLVED

MAGE relies on the counterstatement of questions involved contained in Plaintiff-Appellee's Brief in Opposition to Application for Leave to Appeal, filed on August 26, 2013. With regard to the issue the Supreme Court directed the parties to brief in its Order of February 3, 2016, the following additional question involved is presented:

I. GIVEN THAT THE CIVIL SERVICE COMMISSION HAS CONSTITUTIONAL AUTHORITY TO "FIX RATES OF COMPENSATION" FOR THE CLASSIFIED SERVICE, CONST 1963, ART 11, ¶ 5, AND GIVEN THAT THE RELIEF THE PLAINTIFF REQUESTS IS NOT AVAILABLE UNLESS THE CIVIL SERVICE COMMISSION RECONSIDERS ITS RATE-SETTING DECISION, IS THE PLAINTIFF'S BREACH OF CONTRACT CLAIM COGNIZABLE IN THE COURT OF CLAIMS?

The Court of Claims did not answer this question.

The Court of Appeals did not answer this question.

The Defendants-Appellants will answer "NO."

The Plaintiff-Appellee answers "YES."

COUNTERSTATEMENT OF MATERIAL PROCEEDINGS AND FACTS

MAGE relies on the Counterstatement of Material Proceedings and Facts set forth in Plaintiff-Appellee's Brief in Opposition to Application for Leave to Appeal, filed on August 26, 2013.

Moreover, MAGE is filing along with this Supplemental Brief, a Motion and Affidavit Pursuant to MCR 7.313 to supplement the record. MAGE believes that the record currently is incomplete with regard to facts relevant to the issue the Court has ordered the parties to address in these supplemental briefs, because the Court of Claims has reserved for trial the question of damages pursuant to MCR 2.116(C)(10). Because this appeal is interlocutory, trial on the issue of what relief is available has not yet taken place and hence no record on that issue has been made. MAGE's Motion and supporting Affidavit are akin to an offer of proofs that MAGE would offer during a trial on damages. MAGE believes that these proofs would be relevant to resolving the issues addressed in this supplemental brief, to make clear that the scope of relief the lower court could award is not limited to the pay raise.

Subject of course to the Court granting MAGE's Motion, those proofs would include:

A. MAGE and OSE reached agreements to jointly recommend compensation during the majority of years up to the Consensus Agreement at issue in this appeal.

B. The Civil Service Commission has never rejected a consensus recommendation submitted by the parties, such as Defendant Office of the State Employer (hereinafter "OSE") committed to making along with MAGE in the Consensus Agreement at issue in the instant case.

C. Compliance with the Consensus Agreement was not impossible. At the same time that OSE breached its commitment in the Consensus Agreement to recommend a three percent pay increase for nonexclusively represented employees, it made no attempt to prevent from going into effect the three percent pay raises provided in collective bargaining agreements for exclusively represented employees, despite the fact that the cost of those pay raises was much higher than the pay raises for nonexclusively represented employees, due to the fact that there are a much greater number of exclusively represented employees than nonexclusively represented employees.

D. Based on the foregoing, the Civil Service Commission likely would have accepted a consensus recommendation by the parties. The Civil Service Commission rejected the three percent pay raises for nonexclusively represented employees because OSE recommended no pay increase, in breach of OSE's commitment in the Consensus Agreement to recommend a three percent pay raise.

E. MAGE agreed in the consensus agreement to forego opposition to concessions regarding health insurance for its members, including increases in employee health care premiums, increases to the deductible amounts on the State Health Plan and increases in prescription and office visit copays. MAGE did so in reliance on OSE's *quid pro quo* in the consensus agreement, that it would jointly recommend with MAGE

a three percent pay increase in the third year covered by the Consensus Agreement.

F. MAGE agreed in the Consensus Agreement to forego opposition to a zero percent wage increase for its members in the first year of the Consensus Agreement, only a one percent wage increase for its members in the second year of the Consensus Agreement, in reliance on OSE's *quid pro quo* in the Consensus Agreement, that it would jointly recommend with MAGE a three percent pay increase in the third year covered by the Consensus Agreement.

G. MAGE itself suffered damages as a result of OSE's breach of the Consensus Agreement, which caused a loss of goodwill and membership arising from OSE clouding its obligations under the Consensus Agreement, resulting in a loss of faith and credibility in the pay setting process.

SUPPLEMENTAL ARGUMENT

I. PLAINTIFF'S BREACH OF CONTRACT CLAIM IS COGNIZABLE IN THE COURT OF CLAIMS, EVEN THOUGH THE CIVIL SERVICE COMMISSION HAS CONSTITUTIONAL AUTHORITY TO "FIX RATES OF COMPENSATION" FOR THE CLASSIFIED SERVICE.

A. INTRODUCTION

Courts should avoid, if at all possible, a result that allows a party to a contract to openly flout an obligation under a contract and get away with it. That is exactly what OSE calculated it could do in the instant case. It has offered no plausible argument that the Consensus Agreement does not mean exactly what it says, that OSE along with the other parties to the agreement would recommend to the Coordinated Compensation Panel a three percent general wage increase for the third and final year covered by the Consensus Agreement. Similarly, OSE has offered no plausible denial that it breached the Consensus Agreement, by recommending no pay raise at all, instead of the agreed-upon three percent. OSE further made clear its distain for its obligations when its then director defied the Civil Service Commission's Hearing Officer's subpoena to appear and testify in the related unfair labor practice proceedings.[1] Although OSE now asserts that compliance with the Consensus Agreement was impossible, it conceded in the related unfair labor practice hearing that it was

[1] As explained in MAGE's earlier brief, the Commission's hearing officer gave the Charging Parties the option of holding the proceedings in abeyance while they sought enforcement of his subpoena in circuit court, or submitting negative inferences to be drawn from the former OSE director's refusal to appear and to testify. The Charging Parties in that proceeding chose the latter. See Plaintiff-Appellee's Brief in Opposition to Application for Leave to Appeal, p. 2, footnote 1 and HERM 2010-059 (**App Ex. 9**, at pp. 9-10).

not motivated by an inability to pay.[2] OSE simply bet that it could get away with it. This appeal will determine whether OSE wins that bet.

The Court of Claims can fashion a remedy for this breach which does not impinge on the Civil Service Commission's constitutional authority to "fix rates of compensation." MAGE has not limited its claim for relief to that pay raise or its equivalent in damages. Damages might be calculated, for example, based on the value of the fringe benefits concessions to which MAGE agreed, which are not encompassed in the Civil Service Commission's exclusive authority to "fix rates of compensation." In addition to or aside from that, the Court of Claims may recognize other grounds and measures for damages without impinging on the Commission's exclusive authority. Hence, MAGE requests this Court to remand this case to the Court of Claims, for the trial on damages which has yet to take place.

B. The Court of Claims May Measure Damages Based on the Value of Fringe Benefits Concessions to Which MAGE was Induced to Agree, without Impinging on the Civil Service Commission's Constitutional Authority to Fix Rates of Compensation.

As noted in MAGE's principal brief, the Consensus Agreement contained several *quid pro quos*. MAGE agreed to forego opposition to increases in employee healthcare premiums, increases to the deductible amounts on the State health plan, and increases in prescription and office visit copays, in addition to accepting no pay raise in the first year of the agreement and a one percent pay raise in the second year of the agreement. OSE's inducement for the concessions was its eventually broken promise that it would join MAGE in recommending a three percent pay increase in the third year covered by the Consensus Agreement.

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[2] See Plaintiff-Appellee's Brief in Opposition to Application for Leave to Appeal, and citation to the record therein (HERM 2010-059, **App Ex. 9**, at p. 9).

MAGE's Verified Complaint includes claims for breach of contract and damages resulting therefrom, beyond the three percent pay raise in the final year of the contract. The Verified Complaint states, in relevant part:

> "7. MAGE and its members gave valuable consideration for the Consensus Agreement; *i.e.,* by foregoing any compensation proposals for fiscal years 2009, 2010, or 2011, except as provided in the Consensus Agreement, without the mutual written agreement of all parties. See Exhibit 1.
>
> 8. MAGE and its members provided other valuable consideration for the Consensus Agreement."

Paragraph 18 (under the heading "Count I – Breach of Contract") of the Verified Complaint states:

> "18. As a result of Defendants' breach of the Consensus Agreement, MAGE and its members have suffered damages, in the form of MAGE's members' loss of the three percent pay raise, and in the form of MAGE's members foregoing other compensation, as they complied with the Consensus Agreement without the agreed-upon consideration by OSE and the State of Michigan."

The breach of contract count in the Verified Complaint closes with the following:

> "WHEREFORE, MAGE requests an award of damages on behalf of itself and its members, along with any other relief this Court deems just and appropriate, including costs, prejudgment interest, post-judgment interest, and attorneys' fees."

Exhibit 1 to the Verified Complaint is the Consensus Agreement itself. That was attached to the Complaint pursuant to MCR 2.113(F)(1), requiring that a copy of a written instrument upon which a claim is based be attached to the pleading as an exhibit; pursuant to MCR 2.113(F)(2), such an exhibit is a part of the pleading for all purposes. The Consensus Agreement contains MAGE's agreement not to challenge these fringe benefits concessions; *i.e.*, to jointly recommend them with OSE. Hence, MAGE's breach of contract claim and claim for damages arising therefrom, is not limited to recovering the three percent pay raise or its equivalent in damages.

In *Michigan Coalition of State Employee Unions v. State of Michigan*, 498 Mich 312; 870 NW2d 275 (2015), the Supreme Court held that the Civil Service Commission's exclusive[3] authority to fix "rates of compensation" included only salaries and wages:

> "As used in art 11, §5, we conclude that the term 'rates of compensation' was not understood by the ratifiers of the 1963 Constitution to include fringe benefits such as pensions; rather, the common understanding of the term at that time was that it included only salaries and wages." 498 Mich at 323.

Although the fringe benefits addressed in *Michigan Coalition of State Employee Unions* were pensions, and the fringe benefits concessions that OSE induced MAGE to concede related to health insurance, neither constitutes "only salaries and wages." *Michigan Coalition of State Employee Unions* noted that "art 11, §5 only reserves to the Commission the authority to 'fix *rates* of compensation,' rather than 'compensation' generally." 498 Mich at 324. (Emphasis in original). Hence, measuring damages based on compensation other than the rate of compensation would not intrude on the Civil Service Commission's rate-setting authority.[4]

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[3]Const 1963, art 11, §5 does include a legislative check on compensation increases authorized by the Commission, which is not at issue in the instant case. See *Michigan Coalition of State Employee Unions*, 498 Mich at 318-319.

[4] To the extent that the Court's February 3, 2016, Order can be read as basing the issue for supplemental briefs on the premise "that the relief the Plaintiff requests is not available unless the Civil Service Commission reconsiders its rate-setting decision," MAGE respectfully disagrees. As summarized above, MAGE's Verified Complaint is not limited to recovery of the pay raise denied by the Commission, or its equivalent in damages.

II. APPELLANTS' OTHER ARGUMENTS THAT DAMAGES ARE NOT AVAILABLE ARE NOT RIPE FOR REVIEW, AND SHOULD BE REMANDED TO THE COURT OF CLAIMS..

Appellants premise several of their arguments on the claim that damages are not available.[5].

Those issues have not been decided by the lower court, because the Court of Claims reserved for trial the issue of damages pursuant to MCR 2.116(C)(10), and Appellants filed their interlocutory appeal immediately after the Court of Claims granted partial summary disposition to MAGE on the breach of contract claim. Hence, the issue of damages is not ripe for review, and should be remanded to the Court of Claims for the development of a factual record and decision on damages.

III. ASSUMING, *ARGUENDO,* THAT THE AVAILABILITY OF DAMAGES IS RIPE FOR REVIEW, DAMAGES ARE AVAILABLE.

Should the Supreme Court consider this issue ripe for decision now, the proofs that would be offered at trial will support an award of damages. For example, a trial court has great discretion in deciding to submit the issue of lost profits to a jury, even though lost profits are somewhat speculative, and the jury as trier of fact has discretion in awarding those damages. *Fera v. Village Plaza*, 396 Mich 639; 242 NW2d 372 (1976). "Recovery is not precluded for lack of precise proof…[p]articularly is this true where it is defendant's own act

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[5] See State of Michigan and Office of the State Employer's Application for Leave to Appeal, p. 14 ("one aspect of mootness is 'the Court's ability to fashion appropriate and effective relief to resolve the alleged controversy;' " *Id., p. 21* (arguing that MAGE cannot establish damages because all it contracted for was OSE's recommendation, not the pay raise itself).

or neglect that has caused the imprecision " 396 Mich at 648, citing *Godwin v. Ace Iron and Metal Company*, 376 Mich 360, 368; 137 NW2d 151 (1965). "Defendant's own act…that has caused the imprecision," is an apt description of what OSE has done in the instant case: Its actions evince its calculation that it would escape any meaningful consequence of its breach by doing exactly what it is doing now, by asserting the difficulty of calculating damages. See *U.S. for Use of U.S. Steel Corp v. Constr. Aggregates Corp.*, 559 F Supp 414, *aff'd in part, rev'd in part,* 738 F2d 440 (6th Cir, 1984) (Michigan law does not allow damages on mere speculation, but some uncertainty is allowed.) See also, *Story Parchment Company v. Paterson Parchment Company*, 282 US 555, 563 (1931), citing with approval the Supreme Court of Michigan's decision in *Allison v. Chandler*, 11 Mich 542, 550-556 (1931), holding that when the plaintiff's inability to calculate damages to a reasonable certainty is a result of the defendant's wrongdoing, "the risk of uncertainty should be thrown upon the wrongdoer instead of upon the injured party." 282 US at 563. The *Allison* decision was a case sounding in tort, however, the *Story Parchment* decision applied the same principle in a breach of contract action. *Story Parchment* held that to deny an injured party the right to recover damages that clearly arise from the breach because it is of a nature that cannot be measured with certainty would allow wrongful acts to be profitable. *Id, at 564.* The court held that no part of the loss should be left upon the injured party simply because the defendant's wrongful act prevented the precise amount from being fixed. *Id. at 565.* Accord, *Commonwealth Trust Company of Pittsburg v. Hackmeister Lind Co*, 181 A.787, 790 (PA, 1935), it is "legalized robbery" to relieve a wrongdoer from liability because his wrongful act caused the damages to be uncertain, and "substantial justice is better than exact justice.".

Story Parchment cited with approval *Taylor v. Bradley*, 39 New York 129 (1868), which introduced the "loss of chance" doctrine. *Taylor* asked if a plaintiff "is deprived of his venture, what was this opportunity which the contract had apparently secured him to worth?" *Taylor* answered, "[His] damages are what he lost by being deprived of his chance for profit." 39 New York at 144.

Miller v. Allstate Insurance Company, 573 So. 2d 24 (Fla App, 1990) applied the loss of chance doctrine where an insurer breached a contractual duty to its insured, to preserve a wrecked vehicle which the insured needed as evidence in a planned product liability suit against the manufacturer. Rejecting the insurer's defense that damages were too uncertain to award, the Court held:

> "It is now an accepted principle of contract law, nonetheless, that recovery will be allowed where a plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain. In fact, the law of protecting chances or opportunities originated not as a tort cause of action but rather as an action for breach of contract. See *Comment, Chances as Protected Interests: Recovery for Loss of a Chance and Increased Risk*, 17 U. Balt L.Rev. 139 (1987). This alternative theory of recovery was established under the English common law where the courts rejected the all-or-nothing approach and permitted recovery under circumstances where not only the amount of damages was uncertain, but also where the fact of damage remained open to question. Recovery was based not on the value of contract; instead the value of the plaintiff's opportunity or chance of success at the time of the breach became the basis for the award.
>
> "The factfinder on the damage issue is thus restrained by the risky realities of litigation to reduce the anticipated damages to the extent that any uncertainty reduced the value of the award or earnings. English cases permitted recovery accordingly on the theory that although uncertainty diminishes the value of an opportunity, it does not render it worthless."

In *Van Gulik v. Resource Development Counsel for Alaska, Inc.*, 695 P2d 1071 (Alas, 1985), the court applied contract principles to find a remedy for a finalist in a grand prize drawing whose ticket had been accidentally disposed of by the sponsor just prior to the

drawing. The court rejected the plaintiff's claim that he was entitled to the entire value of the prize, but also rejected the defendant's defense that uncertainty made any award at all unavailable:

> "[G]iven [the sponsor's] factual mistake in overlooking Van Gulik's ticket, no court could define whether Van Gulik's or Cooper's or McGowan's ticket would have been the last ticket drawn.
>
> "It is indeed 'uncertain' whether appellant Van Gulik's would have been the last ticket drawn if the [sponsor] had properly completed the drawing. Thus, Van Gulik's damages must be based on the value of his conditional right at the time of the [sponsor's] breach.... At the time of the RDC's breach, Van Gulik's proper 'chance of winning' was 50 percent.' "

Hence, the court affirmed the trial court's calculation of damages as the conditional 50 percent value of the grand prize.

These cases are in accord with the Restatement (2nd) of Contracts, §348(3) (1981), which states, "If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of the breach."

In accord with these cases, MAGE can claim damages representing at least the lost chance arising from OSE's conduct. MAGE gave valuable consideration, even excluding the value of the pay raises it gave up during the first two years covered by the Consensus Agreement; it gave up the opportunity to contest the fringe benefits concessions which it agreed not to contest.[6] With regard to the probability that those concessions would not actually have been imposed on MAGE's members in the absence of OSE's later broken promise, MAGE can point to the fact that no other group of State employees suffered the

[6]As noted in Section I.B., above, damages may be measured by the fringe benefits concessions without impinging on the Commission's constitutional rate setting authority.

imposition of those fringe benefits concessions, without also receiving the promised three percent pay raise.

IV. ASSUMING, *ARGUENDO*, THE SUPREME COURT RULES THAT PLAINTIFF'S BREACH OF CONTRACT CLAIM IS NOT COGNIZABLE, THE CASE SHOULD BE REMANDED TO THE COURT OF CLAIMS FOR RECONSIDERATION OF MAGE'S UNJUST ENRICHMENT CLAIM.

Court II of the Verified Complaint is for unjust enrichment. In its Motion for Summary Disposition, MAGE conceded that its unjust enrichment claim was sustainable only in the alternative to the breach of contract claim, because a contract will be implied only if there is no express contract covering the same subject matter. *Belle Isle Grill Corp v. Detroit*, 256 Mich App 463; 666 NW2d 271 (2003). The Court of Claims granted Appellant's summary disposition regarding the unjust enrichment claim, on that basis. Nonetheless, if the Supreme Court rules the breach of contract claim not cognizable, the Court of Claims should have the opportunity to revisit the issue of unjust enrichment.

CONCLUSION AND RELIEF REQUESTED

Damages can be awarded without impinging on the Civil Service Commission's constitutional authority to fix rates of compensation. This matter should be remanded to the Court of Claims for a trial on the availability and amount of such damages. Otherwise, OSE's calculation that it could get away with flouting its obligation under the Consensus Agreement will be proven correct. This Court should avoid such a result if at all possible. Hence, MAGE respectfully requests this Honorable Court to reject OSE's interlocutory appeal, and remand this matter for a trial on damages. Alternatively, it should remand for reconsideration of the unjust enrichment claim.

Respectfully submitted,

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